UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS TO DISMISS FOR LACK OF JURISDICTION
AND FOR SUMMARY RELIEF DENIED: May 2, 2008

CBCA 425

801 MARKET STREET HOLDINGS, L.P.

and

801 MARKET STREET ASSOCIATES, L.P.,

Appellants,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Louis B. Antonacci and Todd Metz of Watt, Tieder, Hoffar & Fitzgerald, L.L.P., McLean, VA, counsel for Appellants.

Robert Notigan and Dalton F. Phillips, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before **DANIELS** (Chairman), **PARKER**, and **HYATT**, Board Judges.

HYATT, Board Judge.

This appeal arises from a lease entered into between the General Services Administration (GSA), respondent, and 801 Market Street Holdings, L.P. and 801 Market

Street Associates, L.P. (referred to herein as 801 Market Street), appellants. GSA has moved to dismiss the appeal for lack of jurisdiction. In the alternative, GSA has moved for summary relief, asserting that based upon uncontested material facts the appeal should be denied as a matter of law.

Background

On October 12, 2001, GSA and 801 Market Street (also referred to as the Lessor or owner) entered into a lease for approximately 150,129 square feet of office space on three floors of the building located at 801 Market Street in Philadelphia, Pennsylvania. Appeal File, Exhibit 3. Under the lease, as part of the rental consideration, the Lessor was required to furnish all services, utilities, maintenance, operations, and other considerations as set forth in the lease, as well as all alterations and build-out requirements needed for occupancy by GSA's tenant. *Id.* The term of the lease is established in a rider, paragraph 13, to be a firm period of ten consecutive calendar years, subject to specified termination rights. The lease term was to commence upon acceptance by the Government of all alterations and installations to the space. *Id.*

Under the lease, GSA was responsible for preparing and providing to the Lessor design intent drawings. These drawings were to detail "the Tenant Improvements to be made by the Lessor within the Government's demised area." Appeal File, Exhibit 3 at 22. After the design intent drawings were completed, the Lessor, at its own expense, was required to prepare any and all working drawings for the construction and to obtain any permits needed for the project. *Id.* at 4. Appellants were responsible for providing "all alterations/build-out requirements and installations in accordance with [the] Solicitation for Offers . . . and the design intent documents/drawings." *Id.* at 2. The build-out services were stated to be part of the rental consideration under the lease. *Id.*

The lease contained a tenant improvement allowance (TIA) to be used to pay for the requisite build-out. Appeal File, Exhibit 3 at 14. The initial TIA, in the amount of $4,644,641, was designated "for building out the Government-demised area in accordance with the Government approved design intent drawings." This allowance included all architectural and engineering services required during design and construction of the tenant interior alterations. The amount of $4,000,000 was allotted to tenant alterations. *Id.*, Exhibit 8 at 3. The initial TIA, for the build-out of tenant space, was to be amortized over a period of fifteen years. Additional TIA was to be amortized over the ten-year fixed term of the lease. *Id.*, Exhibit 3 at 8.

The first supplemental lease agreement (SLA) executed by the parties also provided that "[t]he parties acknowledge that the Owner [801 Market Street] will construct the tenant

improvements and alterations required under this Lease and will be the owner of such items, except movable items." Appeal File, Exhibit 4 at 2.

Paragraph 33(a) of the lease permitted GSA, by written order, to make changes within the general scope of the lease in any one or more of the following:

(1) Specifications (including drawings and designs);
(2) Work or services;
(3) Facilities space layout; or
(4) Amount of space, provided the Lessor consents to the change.

Appeal File, Exhibit 3 at 77.

Paragraph 33(b) of the lease provided that if any such change causes an increase or decrease in Lessor's cost or the time required to perform, whether or not changed by the order, the contracting officer shall modify the lease to provide for one or more of the following:

(1) A modification of the delivery date;
(2) An equitable adjustment in the rental rate;
(3) A lump sum equitable adjustment; or
(4) An equitable adjustment of the annual operating costs per ANSI/BOMA [American National Standards Institute/Building Owners and Management Association] usable square foot specified in this lease.

Appeal File, Exhibit 3 at 77.

The Disputes clause of the lease provided a mechanism for 801 Market Street to file claims arising out of the lease. This clause also stated that the lease is subject to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (2000). Appeal File, Exhibit 3 at 79.

On November 2, 2001, 801 Market Street entered into a construction management agreement with Preferred Construction Advisors LLC (Preferred Construction) for the provision of construction management services in connection with construction activities for the property, including the tenant improvements. Supplemental Appeal File, Exhibit 514.

GSA electronically transmitted the design intent drawings to 801 Market Street on February 8, 2002. These design intent drawings were incorporated into the lease. Appeal File, Exhibit 4. The lease specified that once GSA completed the design intent drawings, the

Lessor would be solely responsible and liable for the technical accuracy of the construction drawings in meeting all requirements of the lease. *Id.*, Exhibit 3 at 8.

Preferred Construction issued a request for proposals (RFP) on July 9, 2002, seeking offers for the construction of the build-out space. The RFP advised that it was issued by Preferred Construction Advisors, LLC and the United States Federal Government, General Services Administration. The pertinent terms and conditions provided that the contractor would be required to provide notice to Preferred Construction with respect to acts or directions the contractor deemed to constitute changed work and would proceed to continue to perform the work should a claim or dispute arise. Appeal File, Exhibit 16 at 27. The proposed terms also included a requirement to mediate in the first instance and, in the event the parties could not resolve disputes by mediation, to submit to resolution of the dispute through either arbitration or litigation at the owner's option. *Id.*

On August 6, 2002, Preferred Construction entered into a contract with Nason and Cullen, Inc. to provide general construction services related to the build-out of the GSA space. The contract included the provision for mediation and arbitration of disputes at the owner's [Preferred Construction's] option. Supplemental Appeal File, Exhibit 512. GSA points out that this contract contained several provisions that differ from customary government contract terms, citing to provisions stating that drawings and specifications are to be equal in authority, lack of a requirement for Miller Act bonds, and failure to incorporate Federal Acquisition Regulation (FAR) clauses that are generally present in government contracts. *Id.*

The complaint alleges that during performance of the build-out, GSA directed changes to 801 Market Street's scope of work. These changes were performed by Nason and Cullen and increased the scope of work and time for performance for both Nason and Cullen and 801 Market Street. Complaint ¶¶ 14-15. Nason and Cullen submitted numerous proposed change orders to Preferred Construction seeking adjustments to the time for performance or the price of its contract. Appeal File, Supplemental Appeal File, Exhibits 55-513. The contracting officer did not issue change orders with respect to any of these proposals. Declaration of Carrie S. Vineberg, Contracting Officer (Sept. 18, 2007) ¶¶ 12-13.

At the conclusion of construction, 801 Market Street, Preferred Construction, and Nason and Cullen entered into a liquidating agreement, dated February 3, 2004, to dispose of Nason and Cullen's claims and proposed change orders. The liquidating agreement settled claims that were not based on alleged actions taken by GSA. These claims were listed in Exhibit B of the liquidating agreement. With respect to claims that 801 Market Street and Preferred Construction deemed to be the responsibility of GSA, which were enumerated in Exhibit A to the liquidating agreement, it was agreed that appellants would submit a claim

to GSA and proceed under the disputes Clause in 801 Market Street's lease. Supplemental Appeal File, Exhibit 515.

By letter dated December 4, 2004, 801 Market Street submitted a certified claim in the amount of $1,162,538 to the GSA contracting officer. Appellants' claim asserted that various changes to the lease were caused by GSA's actions and directions. Appeal File, Exhibits 51, 53.

SLA no. 5 was issued on December 21, 2004. This document provides that the amount of $4,644,641, based on the tenant improvement allowance, was amortized into the rental rate. In addition to other matters addressed in this SLA, the following statement is made:

> Lessor and Government agree that the costs outlined on the attached spreadsheet represent the tenant improvement costs that have been agreed upon by the parties as of the date of execution of this SLA. . . . Lessor and Government further agree that the Lessor's General Contractor, Nason and Cullen, Inc. submitted $1,162,538 in outstanding Proposed Change Orders ("PCOs") which are in dispute between Lessor and Government. Lessor has advised Government that Lessor (or Lessor on behalf of its contractor, Nason and Cullen, Inc., or Nason and Cullen, Inc. in the name of Lessor) intends to exercise its rights under Paragraph 36 "52-2333-1 DISPUTES (December 1998)" of the general clauses of the Lease against the Government related to the outstanding PCOs.

Appeal File, Exhibit 8 at 1.

On August 15, 2005, the contracting officer issued a final decision denying the claim in its entirety. 801 Market Street filed a timely notice of appeal at the General Services Administration Board of Contract Appeals.[1] After joinder of issue, the parties pursued

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[1] On January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, the General Services Board of Contract Appeals was terminated and its cases, personnel, and other resources were transferred to a newly-established Civilian Board of Contract Appeals (CBCA). The case remains as it was; the docket number has been changed to reflect the transfer to the new Board.

discovery until respondent filed its two motions, one contending that the Board lacks jurisdiction to entertain this appeal and the second asserting, in the alternative, that the appeal must be denied as a matter of law.

Discussion

At the outset, we note that while respondent has submitted two separate motions, its primary factual and legal contentions with respect to both jurisdiction and summary relief are largely the same. GSA maintains that the claim presented in this appeal did not arise directly under the lease, but rather out of the separate "non-Government" contract entered into between Preferred Construction and Nason and Cullen. GSA regards this action as one based on the "Contract" entered into between these two entities and thus characterizes this appeal as a purely private dispute between those two contractors, who are not in privity with the Government and should not be permitted to pursue relief in this forum. As such, GSA argues that the Board has no jurisdiction over this matter and should dismiss or deny the appeal. Although the arguments presented in the two motions are very similar, we discuss and rule on the motions separately.

Jurisdiction

GSA contends that Preferred Construction and Nason and Cullen, the contractors that have generated these claims, have no standing to pursue the claims in issue against the Government since neither 801 Market Street, the Lessor, nor GSA was a party to the contract between Preferred Construction and Nason and Cullen. These contractors are not in privity of contract with the Government so as to be eligible to assert claims against GSA. Moreover, GSA argues, Preferred Construction's contract with Nason and Cullen is not a Government subcontract, and does not contain the customary features of such contracts, such as provisions that disputes will be decided under the CDA and requirements for Miller Act bonds. Thus, the Government asserts, Nason and Cullen cannot be regarded as a government subcontractor.

GSA notes that 801 Market Street, in its complaint, alleged that it, as Lessor, had contracted with Nason and Cullen for the performance of the construction work necessary to complete the tenant space. Complaint ¶ 13. GSA points out that this allegation is erroneous -- the Nason and Cullen contract is with Preferred Construction, not with appellants. GSA asserts that this inaccuracy supports its position that the claim that has been presented is in reality a claim arising between two non-parties to the lease, which is the only

agreement covered by the CDA. GSA urges that while the Board has jurisdiction to hear disputes arising under the lease, it does not have jurisdiction to adjudicate a private dispute between two contractors with which the Government has no privity and which arose under a non-Government contract or subcontract.

801 Market Street has a ready response to GSA's contentions. Appellants concede that the allegation in the complaint that they contracted with Nason and Cullen was in error, but argues that this is irrelevant. Appellants meant to aver that they had contracted with Preferred Construction, not with Nason and Cullen. Appellants point out that GSA has focused on two entities that are admittedly not parties to the lease, while effectively ignoring the fact that the appeal itself has been brought by the Lessor, which is a party to a government contract providing for the resolution of disputes under the CDA. 801 Market Street properly certified and submitted the claim in issue here to the contracting officer for resolution. After the contracting officer denied the claim, 801 Market Street timely filed an appeal of the contracting officer's decision.

Subject matter jurisdiction is a threshold matter which must be addressed before the Board proceeds to consider the merits of appellants' claim. The determination turns on the basis of jurisdictional facts or evidence provided by the parties. Although the appellants bear the burden to establish that jurisdiction exists, "in passing on a motion to dismiss . . . on the ground of lack of jurisdiction over the subject matter the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *accord Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989); *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988); *Kentucky Bridge & Dam, Inc. v. United States*, 42 Fed. Cl. 501, 515 (1998); *CACI, INC.- FEDERAL v. General Services Administration*, GSBCA 15588, 02-1 BCA ¶ 31,712, at 156,635 (2001).

GSA recognizes that a prime contractor that is liable to a subcontractor for damages sustained by the subcontractor due to Government actions may bring a pass-through suit on behalf of its subcontractor. What GSA appears to question is whether 801 Market Street, as the Lessor, can bring a pass-through suit that arises from a contract between its construction manager and the construction company, neither of whom are, as GSA puts it, "Government subcontractors." GSA considers that these contracts are too far removed to qualify for sponsorship by a prime contractor since the Lessor was not a party to the lower-tier contract.

To support this notion, GSA cites us to *AG Route Seven Partnership v. United States*, 57 Fed. Cl. 521 (2003), *aff'd*, 10 Fed. App'x 184 (Fed. Cir. 2004) (table), *cert. denied*, 544

U.S. 948 (2005). *AG Route Seven Partnership* is a *Winstar*[2]-related case brought by shareholders of a successor thrift savings institution. Private shareholders, along with other parties, filed suit seeking damages arising from the Government's actions with respect to the original ailing thrift institution. The court dismissed the suit brought by the private plaintiff shareholders on the ground that no implied-in-fact contract existed between the Government and investors who became shareholders of the new thrift, created to effect supervisory acquisition of the ailing thrift, where the new thrift, and not the investors, acquired the assets of the ailing thrift, and thereafter entered into separate and exclusive transactions with the Government. This case is simply not apposite, however. It is not a suit under the CDA, but rather involves a series of complicated transactions arising from government efforts to shore-up a failing thrift institution. This case simply does not contain any analysis that is pertinent to the well-defined rights of parties under the CDA.

Most significantly, Preferred Construction and Nason and Cullen, unlike the shareholders in *AG Route Seven Partnership*, have not attempted to bring direct suits against the Government; rather, they have adhered to the well-established procedure of presenting their claims under the sponsorship of 801 Market Street, which is in privity with both the Government and Preferred Construction.

801 Market Street is the Lessor under a lease between it and the Government and thus is a "contractor" as that term is defined in the CDA. 41 U.S.C. § 601(4). The CDA makes no distinction regarding the rights of a lessor as opposed to any other contractor. Disputes arising from such leases are subject to resolution by the procedures specified in the Act. To the extent that a lease between the Government and another party is considered a contract within the purview of the CDA, the traditional rights accorded to all contractors generally apply to such lessors. *E.g.*, *Forman v. United States*, 767 F.2d 875, 879 (Fed. Cir. 1985); *Modeer v. United States*, 68 Fed. Cl. 131, 136 (2005).

Appellants consider GSA's contention that the construction manager and construction company are not "subcontractors" to be irrelevant, citing the 48 CFR 44.201-1 (2001), which defines a subcontractor as "any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor." Preferred Construction and its construction contractor, Nason and Cullen, furnished supplies and services necessary to complete the tenant improvements in the premises that were to be occupied by GSA under its lease with 801 Market Street.

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[2] *See United States v. Winstar Corp.*, 518 U.S. 839 (1996).

Although Preferred Construction and Nason and Cullen were not in privity of contract with GSA, all of the entities involved in this process would not have been performing this build-out if not for the lease under which 801 Market Street was obligated to provide office space in accordance with GSA's design intent drawings. Thus, although the entities that incurred the costs in the first instance are not in privity with the Government, this does not automatically bar a suit by the prime contractor, in this case 801 Market Street, to recover costs for changed work incurred by a lower-tier contractor that are alleged to be due to government actions. The contractual relationships formed between 801 Market Street and Preferred Construction and between Preferred Construction and Nason and Cullen come within the purview of the "time-honored practice" of allowing "prime contractors" to sponsor appeals of their immediate and lower-tier subcontractors. *See Lombardo's Lakeview Resort*, ENG BCA 5873-Q, 95-1 BCA ¶ 27,522, at 137,184.

Appellants presented a certified claim to the contracting officer and timely appealed the decision. This suffices to meet the initial burden to establish the Board's jurisdiction. After weighing the jurisdictional facts, the Board concludes that 801 Market Street is a proper sponsor for this pass-through claim. The Board has jurisdiction to entertain this appeal.

Summary Relief

In the alternative, respondent contends that the appeal should be denied as a matter of law. Respondent maintains that many of the same facts, which are largely undisputed, demonstrate that the Government should prevail as a matter of law. Respondent effectively argues that the same facts that support its contention that the Board lacks jurisdiction to hear this claim similarly demonstrate that, even if the Board has jurisdiction, it must nonetheless deny the appeal at this juncture.

Summary relief is properly granted when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001); *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996). In resolving summary relief motions, a fact is considered to be material if it will affect our decision and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant at a hearing. *John A. Glasure v. General Services Administration*, GSBCA 16046, 03-2 BCA ¶ 32,284, at 159,746 (citing *Celotex Corp.*; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). The moving party bears the burden of establishing the absence of any genuine issue of material fact. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Finally, all reasonable inferences are

drawn in favor of the non-moving party. *Anderson*, 477 U.S. at 255; *Acquest Government Holdings, OPP, LLC v. General Services Administration*, CBCA 413, 08-1 BCA ¶ 33,720, at 166,968 (2007).

The crux of respondent's claim in this motion, as it was in the motion to dismiss for lack of jurisdiction, is that Nason and Cullen had no direct contractual relationship with 801 Market Street and is not a "government subcontractor." As we pointed out above, there is a well-established body of law under which contractors may sponsor, or pass through, the claims of their subcontractors and lower-tier subcontractors. The practice dates back to *Severin v. United States*, 99 Ct. Cl. 435 (1943), and is referred to as the *Severin* doctrine.[3] In *Severin*, the Court, recognizing the principles of privity of contract and sovereign immunity, held that a subcontractor's claim may only be recognized in the disputes process if the prime contractor is obligated to pay the subcontractor. In discussing the doctrine, our Board has recently observed:

> The post-*Severin* direction has been for the doctrine to be construed narrowly. *See United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1552 n.8 (Fed. Cir. 1983). In its present state, the doctrine applies only where there is an iron-clad release or contract provision immunizing the prime contractor completely from any liability to the subcontractor. *J.L. Simmons Co. v. United States*, 304 F.2d 886 (Ct. Cl. 1962); *Cross Construction Co. v. United States*, 225 Ct. Cl. 616 (1980); *George Hyman Construction Co. v. United States*, 30 Fed. Cl. 170 (1993), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994) (table). Also, the burden is on the Government to establish the existence of an iron-clad release, sufficient to trigger application of the *Severin* doctrine. *Metric Constructors, Inc. v. United States*, 314 F.3d 578 (Fed. Cir. 2002).

Acquest Government Holdings, 08-1 BCA at 166,969. It is well-settled that the *Severin* doctrine does not bar claims of lower-tier contractors whose work has been impacted by government directions. *See Time Contractors, J.V.*, DOT BCA 1669, 87-1 BCA ¶ 19,582,. at 99,028; *see also Owens-Corning Fiberglass Corp. v. United States*, 419 F.2d 439 (Ct. Cl. 1969) (prime contractor permitted to pursue pass-through claims of second-tier subcontractor). The rationale for permitting the prime contractor to pass through claims of

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[3] We note for the record that although the Federal Circuit alluded to the *Severin* doctrine in jurisdictional terms in *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1552 n.8 (Fed. Cir. 1983), several boards have held that the doctrine is most properly asserted as an affirmative defense. *See Caddell Construction Co.*, ASBCA 46231, et al., 95-2 BCA ¶ 27,772; *Lombardo's Lakeview Resort, Inc.*

second and even lower-tier contractors is that these claims "are those of the higher-tiered subcontractor, which in turn are those of the prime." *Time Contractors*, 87-1 BCA at 99,028.[4]

To prevail in this motion, GSA must demonstrate that an "iron-clad release or contract provision" conclusively exonerates 801 Market Street for liability to the subcontractors for the Government actions at issue here. Appellants maintain that the Government cannot meet this burden in light of the liquidating agreement appellants entered into with Preferred Construction and Nason and Cullen, under which appellants agreed to sponsor Nason and Cullen's claims based on GSA-directed changes to the contract. To the extent the claim is successful, Nason and Cullen will receive payment for the extra expenses it incurred in performing the enumerated changes to the work as well as delays experienced in the construction work in the tenant space. This type of agreement preserves a prime contractor's eligibility to sponsor claims of its lower-tier subcontractors. A liquidation agreement under which the prime contractor remains conditionally liable to the subcontractor only as and when the prime contractor receives payment from the Government suffices to permit the prime contractor to proceed against the Government. *See W.G. Yates & Sons Construction Co. v. Caldera*, 192 F.3d 987, 991 (Fed. Cir. 1999); *Kentucky Bridge & Dam, Inc.*, 42 Fed. Cl. at 527; *Acquest Government Holdings,* 08-1 BCA at 166,969. In addition, GSA has not identified any contract provision in either Preferred Construction's contract with 801 Market Street or in Nason and Cullen's contract with Preferred Construction that would operate conclusively to relieve Lessor of liability.

Although GSA has labored industriously to distance itself from any contractual responsibility for changed work that may have occurred during the build-out of its space, it has not succeeded in this effort. The lease's Changes clause contains language that permits GSA to direct changes in the construction of the premises as well as with respect to other matters that might arise under the lease after occupancy. Nothing in the lease prevents the agency from making changes to the build-out process, which is what appellants allege occurred. Given that the applicable law does not support GSA's contention that the claim is barred as a matter of law, we must deny respondent's motion for summary relief.

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[4] *See generally TAS Group v. Department of Justice*, DOT BCA 4535, 06-2 BCA ¶ 33,441, for a thorough discussion of the genesis and evolution of the *Severin* doctrine as it is currently applied .

Decision

The motions to dismiss for lack of jurisdiction and for summary relief are **DENIED**.